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September 30, 2020

VIA EMAIL ONLY

Rebecca A. Womeldorf, Secretary
Committee on Rules of Practice and Procedure
Administrative Office of the United States Courts
One Columbus Circle, NE
Washington, D.C. 20544

Re: Amending Federal Rule of Evidence 702 to Clarify Courts' "Gatekeeping" Obligation

Dear Ms. Womeldorf:

We write in support of the proposed clarification of Federal Rule of Evidence 702 to emphasize a court's responsibility to act as the gatekeeper for expert testimony. Clarifying that courts must find the requirements of Rule 702 are met by a preponderance of the evidence would both (1) help restore the intent of *Daubert* to cases applying Rule 702; and (2) promote findings on the record that would help ensure fair process and meaningful appellate review. In our experience, the proposed change would benefit both parties and courts.

In *Daubert v. Merrell Dow Pharmacueticals, Inc.*, 509 U.S. 579 (1993), the Supreme Court expressed confidence that "federal judges possess the capacity" to serve as the "gatekeeper" for expert testimony, determining "whether the reasoning or methodology underlying the testimony is scientifically valid" and "whether that reasoning or methodology properly can be applied to the facts in issue." *Id.* at 592–93. Making this determination is the trial court's responsibility because the Rules of Evidence "assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id.* at 597. "Faced with a proffer of expert scientific testimony, then, the trial judge must determine at the outset, pursuant to Rule 104(a), whether the expert is proposing to testify to (1) scientific knowledge that (2) will assist the trier of fact to understand or determine a fact in issue." *Id.* at 592.

Courts have struggled to apply *Daubert*. Rather than make findings on the Rule 702 standards—whether "(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case"—courts have begun to treat these criteria as affecting the weight, rather than the admissibility, of expert testimony. *See, e.g., Krommenhock v. Post Foods, LLC*, 334 F.R.D. 552, 580 (N.D. Cal. 2020) ("Post's challenges to Silverman's methodology and failure to consider specific issues go to weight, not admissibility."); *In re ResCap Liquidating Tr. Litig.*, 432 F. Supp. 3d 902, 926 (D. Minn. 2020) ("[T]he reliability of Plaintiff's appraisal experts' GAVM method goes to weight not admissibility[.]").

We have seen firsthand both the importance of judges acting as gatekeepers as well as the consequences when judges view the Rule 702 standards as mere benchmarks for evaluating the weight, rather than the admissibility, of expert testimony. These consequences include allowing cases to proceed past the summary judgment stage based on insufficient and unreliable expert testimony, determinations of liability or the awards of massive damages based on unreliable expert testimony, and the application of an erroneous standard of review on appeal if the Rule 702 criteria are improperly viewed as going to the weight and not the admissibility of evidence. Even if trial court error can be corrected on appeal, the entry of judgment based on unreliable expert testimony may require the defendant to establish a reserve pending appeal, potentially impacting shareholder value.

By clarifying that admissibility requires courts to make these specific findings—and based on the preponderance of the evidence—we anticipate two additional benefits. First, we anticipate that district judges' written explanations of decisions to admit or exclude expert testimony would be more detailed and better explained, facilitating appellate review of these important decisions. If a district court must affirmatively and expressly find that each of the requirements of Rule 702 has been satisfied, judges must engage in rigorous analysis.

Second, we anticipate that district judges would be more likely to hold hearings regarding the admission of expert testimony. A hearing, in which a judge can opt to hear from the experts, hear live argument from counsel, and when necessary, ask questions of the experts, focuses a court's attention on the relevant standards, in a way that a decision on the papers does not.

Hearings can particularly valuable for issues involving complex technology. In patent infringement cases, for example, courts determining the meaning of patent claims often first have the parties present a technology tutorial, followed by *Markman* hearing in which the parties discuss the claims. Peter S. Menell et al., *Patent Case Management Judicial Guide* 2-18–2-19 (3d ed. 2016); *see also id.* at 5 6 ("Depending on the complexity of the technology at issue, it is often useful to plan for technology tutorials in conjunction with the Markman proceeding."); *id.* at 5-16–5-18 (discussing technology tutorials).

We do not suggest that holding a hearing would always be necessary (or appropriate), but some expert testimony involves highly complex and technical subject matter, and it may benefit the trial court to have either of both of a "technology tutorial" or a live *Daubert* hearing before ruling on the admissibility of expert testimony. A formal amendment to Rule 702 will help to reinforce that judges must take their gatekeeping responsibilities—including the need to understand the science, methodology or technology underlying the expert opinion—as seriously as they do when interpreting patent claims.

Litigation during the COVID-19 pandemic has illustrated that the burden of additional hearings can be minimized by technology. Parties and witnesses can appear remotely by videoconference without any need for travel, limiting the expenses for the parties and making scheduling easier for courts.

For these reasons, we urge the Rules Committee to adopt the proposed amendment to Federal Rule of Evidence 702 and expressly require that before admitting expert testimony, a court find that each of the requirements of Rule 702 be satisfied by a preponderance of the evidence.

Sincerely,

/s/ J. Gordon Cooney, Jr.
J. Gordon Cooney, Jr.

/s/ William R. Peterson
William R. Peterson